

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

JANUARY TERM, 1902.

No. 1153.

No. 10, SPECIAL CALENDAR.

122

CONSUMERS' BREWING COMPANY, A CORPORATION,
APPELLANT,

vs.

EDWIN TOBIN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 17, 1901.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

CONSUMERS' BREWING COMPANY, a Corporation, Appel-
lant,
vs.
EDWIN TOBIN. } No. 1153.

a Supreme Court of the District of Columbia.

CONSUMERS' BREWING COMPANY, a Corpora-
tion, Plaintiff,
vs.
EDWIN TOBIN, Defendant. } No. 44810. At Law.

UNITED STATES OF AMERICA, } ss:
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Jul- 17, 1901.

In the Supreme Court of the District of Columbia.

CONSUMERS' BREWING COMPANY (a Corpora-
tion), Plaintiff,
vs.
EDWIN TOBIN, Defendant. } At Law. No. 44810.

The plaintiff, Consumers' Brewing Company, a corporation, sues the defendant, Edwin Tobin, for that the defendant and his wife, Ellen Tobin, on the 7th day of May, 1900, by their promissory note, now overdue, jointly and severally promised to pay to Abe King or order, at Citizens' National Bank of the City of Washington, District of Columbia, the sum of one thousand and twenty-one dollars and forty-four cents (\$1,021.44) on demand, with interest thereon at the rate of six (6) per centum per annum, and the said payee thereafter endorsed the said note to the plaintiff, and the said note was on or about the 19th day of June, 1900, duly presented for payment and payment thereof was then duly demanded of the defendant, but the defendant did not pay the same or any part thereof, excepting only

the sum of three hundred and twenty-nine dollars and fifty-one cents (\$329.51), and the said sum of \$329.51 has been duly credited on said note, and the plaintiff claims seven hundred and forty-four dollars and two cents (\$744.02), with interest thereon, at the rate of six per centum per annum, from the 13th day of March, 1901.

And the plaintiff, Consumers' Brewing Company, a corporation, sues the defendant, Edwin Tobin, for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them; and the plaintiff claims the sum of seven hundred and seventy-nine dollars and seven cents (\$779.07), with interest on the sum of \$774.02 from March 13, 1901, and also interest on the sum of thirty-five dollars and five cents (\$35.05) from December 31, 1900, according to the particulars of demand hereto annexed, besides costs of suit.

LORENZO A. BAILEY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

LORENZO A. BAILEY,
Attorney for Plaintiff, Pacific Building, Washington, D. C.

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Particulars of Demand.

Filed Jul- 17, 1901.

(Copy of note.)

\$1,021.44.

ALEXANDRIA, VA., May 7, 1900.

On demand we jointly and severally promise to pay to Abe King or order the sum of one thousand and twenty-one dollars and forty-four cents for value received, with interest thereon at the rate of six per centum per annum, negotiable and payable at Citizens' National Bank of the City of Washington, District of Columbia; and we hereby waive the homestead exemption as to this note, which is secured by a deed of trust upon the personal property, goods, and chattels in the "Exchange and Ballard hotel," in the city of Alexandria, in the State of Virginia.

EDWIN TOBIN.
ELLEN TOBIN.

(Revenue stamps, 22c.)

(Endorsed :) Without recourse to me. Abe King.

(Credits endorsed on note :) 1900, June, \$5.11; Sept. 5, \$10.22; Oct. 10, \$5.11; Nov. 9, \$5.11; 1901, Jan'y 7, \$10.21; Mar. 13, \$293.75.

Statement.

Folio No. —.

ROSSLYN, VA., *July 1st, 1901.*Mr. Edw. Tobin, 456 La. Ave. N. W., to Consumers' Brewing Co. of
Rosslyn, Va.

DR.

1900.

Sept.	3.	To	$\frac{1}{2}$	porter, at 8.00.....	\$4.00
Oct.	4.		$\frac{1}{2}$	" "	4.00
			$\frac{1}{2}$	ale "	4.00
	30.		$\frac{1}{2}$	" "	4.00
Nov.	24.		$\frac{1}{2}$	" "	4.00
Dec.	1.		$\frac{1}{2}$	" "	4.00
					<hr/>
					24.00

Bottle beer.

1900.

1900.				
Nov.	30.	To	balance.....	6.25
Dec.	1.	"	1 case Dewey.....	.80
	3.	1	"80
	5.	1	"80
	7.	1	"80
	8.	1	"80
	13.	1	"80
				<hr/>
				\$35.05

Add interest from Dec. 30, 1900.

DISTRICT OF COLUMBIA, ss :

I, Abe King, being first duly sworn, on oath say that Consumers' Brewing Company, named as plaintiff in the declaration to which this affidavit is attached, is a corporation; that I am the secretary and treasurer of said corporation and am authorized by said corporation to make this affidavit on its behalf; that the said corporation has a good cause of action against Edwin Tobin, the defendant named in said declaration, which said cause of action is as hereinafter stated; that ever since long prior to May 7, 1900, the said corporation was engaged in the manufacture of beer and other malt liquors in the State of Virginia, and was engaged in the sale thereof in the State of Virginia and in the District of Columbia and elsewhere; that on May 7, 1900, the said Edwin Tobin and Ellen Tobin, his wife, made and delivered to me their promissory note, bearing date May 7, 1900, for the sum of \$1,021.44, payable to Abe King or order on demand at Citizens' national bank, in the city of Washington, District of Columbia, with interest thereon at 6 % per annum; that thereafter, before payment of said note was demanded, I endorsed and delivered the said note to the plaintiff corporation; that payment

of said note was secured by a certain deed of trust upon
 3 certain goods and chattels at the city of Alexandria, in the
 State of Virginia, which said deed of trust was foreclosed, and
 the proceeds of said foreclosure, amounting to the sum of \$293.75,
 were paid over to said plaintiff and are credited on said note; that
 the defendant has also paid from time to time as interest certain
 sums of money, amounting in the aggregate to \$35.76, which amount
 has also been credited on said note; that on or about June 19, 1900,
 and also on or about December 31, 1900, and at other times the
 said note was duly presented for payment and payment thereof de-
 manded and refused; that the plaintiff has also from time to time
 sold and delivered to the defendant during the period commencing
 September 3, 1900, and ending December 13, 1900, beer, ale, and
 porter of the value of \$35.05, as set forth in the particulars of de-
 mand hereto attached; that a true copy of the said note, and also a
 true copy of plaintiff's account for beer, ale, and porter sold and de-
 livered to the defendant, as aforesaid, are correctly set forth in said
 particulars of demand; that the said declaration and particulars of
 demand are hereby referred to and made part of this affidavit; that
 the defendant has not, nor has any person for him, paid said note,
 excepting only the sums of \$35.76 and \$293.75, which have been
 credited on said note, as aforesaid, and that the defendant has never
 paid the sum of \$35.05 due for beer, ale, and porter, as aforesaid, in
 whole or in part; that by reason of the premises there is now justly
 due and owing to the plaintiff from the defendant the sum of
 \$779.07, with interest on \$744.02 at the rate of 6% per annum, from
 March 13, 1901, and also interest on the further sum of \$35.05, at
 the rate of 6% per annum, from December 31, 1900, exclusive of all
 set-offs and just grounds of defense.

ABE KING.

Subscribed and sworn to before me this 17th day of July, A. D.
 1901.

[NOTARIAL SEAL.] A. L. BAILEY,
Notary Public in and for said District.

Summons.

Issued July 17, 1901,

In the Supreme Court of the District of Columbia.

CONSUMERS' BREWING COMPANY, a Corpora- tion, Plaintiff, vs. EDWIN TOBIN, Defendant.	}	At Law. No. 44810.
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The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on or before
 the twentieth day, exclusive of Sundays and legal holidays, after
 the day of the service of this writ on you, to answer the
 4 plaintiff's suit and show why it should not have judgment
 against you for the cause of action stated in its declaration.

Witness the Honorable Edward F. Bingham, chief justice of said court, the 17th day of July, A. D. 1901.

[SEAL.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Assistant Clerk.

LORENZO A. BAILEY, *Attorney*.

Marshal's Return.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 18 day of July, 1901.

AULICK PALMER, *Marshal*.

Pleas and Affidavit of Defendant.

Filed Aug. 6, 1901.

In the Supreme Court of the District of Columbia.

CONSUMERS' BREWING COMPANY, a Corpora-	}	At Law. No. 44810.
tion,		
vs.		
EDWIN TOBIN.		

And now comes the defendant, by his attorney, Ellis Hughes, and for a plea to the declaration herein filed says he never promised as therein alleged.

2. And for a further plea defendant says he is not indebted as alleged.

ELLIS HUGHES,
Defendant's Attorney.

DISTRICT OF COLUMBIA, ss:

I, Edwin Tobin, on oath depose and say that I am the defendant named in the foregoing and annexed plea to the declaration herein filed, wherein The Consumers' Brewing Company is named as plaintiff, and said plea is hereby expressly referred to and made a part of this affidavit; that I have a good defense to said action; that I admit the execution of the note referred to in the particulars of demand and affidavit annexed to said declaration and the non-payment thereof; but this affiant expressly denies his liability on said note, for that the same was procured by the fraudulent misrepresentations and imposition of one Edward L. Jordan at and before the time of the execution thereof, the said Jordan being at said time the president of the plaintiff company; that shortly before the execution of said note the said Jordan informed affiant that the chattels, fixtures, and other personal property then in a certain hotel, known as the "Exchange and Ballard hotel," were for sale, and advised and urged affiant to purchase same and engage in business in said place; that this affiant was totally unacquainted with the value of the said stand as a business

place, and was also unacquainted with the city of Alexandria, Virginia, where said hotel is located, but relied upon the aforesaid representations of the said Jordan, who informed affiant that said place was a good business stand; that the said Consumers' Brewing Company had shortly before said time bought in at auction the said goods and chattels for the sum of six hundred (\$600) dollars at a sale by one James Caton, as trustee under a chattel mortgage or deed of trust securing the said plaintiff company; that, acting upon the aforesaid advice and representations of the said Jordan, affiant agreed to purchase said chattels and fixtures and personal property, and took a bill of sale therefor, executing a note payable to Abe King, the secretary and treasurer of the plaintiff company and a nominal party to the transaction, who afterwards endorsed the same over to the plaintiff company; that affiant entered into the possession of the said hotel and commenced the conduct of said business; that said business was unprofitable from the start, and affiant abandoned the active management thereof and sold the stock in trade therein to one Edwin Dean, who agreed to pay affiant the sum of five and $\frac{11}{100}$ (\$5.11) dollars monthly as rent for said goods and chattels, said sum being the amount of interest due monthly on said promissory note; that, as aforesaid, affiant admits the non-payment of said note, and affiant further admits that demand for payment was made at the bank where same was made payable; that sale of the chattels for which said note was executed and on which said note was secured, as set out in the affidavit of the plaintiff, was made, and the sum of three hundred and fifty (\$350) dollars was received for said chattels, but the trustees under said chattel trust, who were the then president and the then attorney of the said plaintiff company, never rendered this affiant any account; that affiant expended large sums of money in attempting to conduct said business and lost a considerable sum by reason of the venture; that but for the aforesaid representations and suggestions of the said Jordan affiant would not have purchased said goods, chattels, and personal property, and affiant here charges that said chattels were not worth the sum of ten hundred and twenty-one and $\frac{44}{100}$ (\$1,021.44) dollars, the amount of said note, nor was the said business a profitable one, and the said Jordan well knew the same, but, notwithstanding, fraudulently persuaded this affiant to execute the said note; that this affiant is informed and believes, and so charges, that the object of the said Jordan in inducing him to purchase said place was to secure the payment of a debt due said company by the former owner of said chattels and occupant of said hotel; that the said company is not an innocent holder of said note, but, as aforesaid, the said payee, King, is an officer of said company and a nominal party to said transaction, and the said Jordan was at the time of the execution of the said note the president of said company.

That, as to the account set out in the particulars of demand annexed to said declaration, affiant has always admitted the sum of nineteen and $\frac{30}{100}$ (\$19.30) dollars to be due thereon; that he admits the charges of said account to be true and correct, but claims credit

for twelve (\$12) dollars for three one-half barrels of porter purchased from said company and charged for in said account, which became sour while in the ice-box of affiant, and which plaintiff company agreed to take back and was bound by the custom of the trade to take back; that, in addition, affiant is entitled to a credit of two and $\frac{4}{10}$ (\$2.40) dollars as a discount on the ale and porter for which charges are made in said account, and a credit of one and $\frac{35}{100}$ (\$1.35) dollars as a discount on the amount charged in said account for bottled beer, said discounts being customarily allowed to this affiant by said company, and plaintiff having agreed to allow same to affiant; that a collector of said company left statements of account with affiant, showing said sum set out in the plaintiff's particulars of demand to be due, less the said discounts aforesaid, and this affiant has always held himself in readiness to pay same, less the sum of twelve (\$12) dollars, for which he claims allowance, as aforesaid, and he hereby tenders said plaintiff the said sum of nineteen and $\frac{30}{100}$ (\$19.30) dollars.

EDWIN TOBIN.

Subscribed and sworn to before me this 6th day of August, 1901.

J. R. YOUNG, *Clerk*,

By FRED. C. O'CONNELL, *Ass't Clerk*.

6

Remittitur of \$15.75, &c.

Filed November 19, 1901.

In the Supreme Court of the District of Columbia.

CONSUMERS' BREWING COMPANY }

vs.

EDWIN TOBIN.

} At Law. No. 44810.

Now comes here the plaintiff, Consumers' Brewing Company, by its attorney, and remits of the amount claimed in the declaration the sum of \$12.00 for three one-half barrels of porter, and also the sum of \$2.40 as discount on ale and porter, and also the sum of \$1.35 as discount on bottled beer mentioned in the defendant's affidavit of defense, and for which said several sums the defendant Tobin has claimed credit in said affidavit filed in this suit, and amounting in the aggregate, for said credits and the amounts so remitted, to the sum of \$15.75.

And thereupon, after having remitted, as aforesaid, \$15.75 of the amount claimed in the plaintiff's declaration, the said plaintiff, by its attorney, now here moves the court for judgment against the defendant, Edwin Tobin, for the full sum claimed in the declaration less the sum of \$15.75 so remitted as aforesaid.

LORENZO A. BAILEY,

Attorney for Plaintiff.

The defendant will take notice that the foregoing remittitur will be forthwith filed and that the foregoing motion will be called for

hearing before Mr. Justice Clabaugh at the opening of court on Friday, November 22, 1901, or as soon thereafter as counsel may be heard.

LORENZO A. BAILEY,
Attorney for Plaintiff.

7 Service acknowledged November 19, 1901.

ELLIS HUGHES,
Attorney for Defendant.

Supreme Court of the District of Columbia.

MONDAY, *December 2, 1901.*

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * *

CONSUMERS' BREWING COMPANY, Plaintiff,	} No. 44810. At Law.
<i>vs.</i>	
EDWIN TOBIN, Defendant.	

Comes now the plaintiff, by its attorney, Mr. Lorenzo A. Bailey, and, exhibiting to the court a remittitur of \$15.75 of the amount claimed in its declaration, again moves for judgment; upon consideration whereof it is ordered that said motion be, and the same is hereby, overruled.

8 *Order of Court of Appeals Allowing Special Appeal.*

Filed December 6, 1901.

Court of Appeals of the District of Columbia, October Term, 1901.

CONSUMERS' BREWING COMPANY, Petitioner,	} Law. No. 44810. No. 104, Original Docket.
<i>vs.</i>	
EDWIN TOBIN.	

Petition for allowance of a special appeal.

On consideration of the petition of the Consumers' Brewing Company for the allowance of a special appeal from an order of the supreme court of the District of Columbia entered herein on the 2d day of December, A. D. 1901, it is now here ordered by the court that said appeal be, and the same is hereby, allowed.

By the court:

[SEAL.]

R. H. ALVEY, *Ch. Justice.*

December 4, 1901.

A true copy.

Test: ROBERT WILLETT, *Clerk.*

11 *Order for Citation and Record on Appeal.*

Filed December 6, 1901.

In the Supreme Court of the District of Columbia.

CONSUMERS' BREWING COMPANY	} At Law. No. 44810.
vs.	
EDWIN TOBIN.	

The clerk of said court will please issue citation on appeal; also prepare record on appeal, including therein:

1. Declaration, notice to plead, particulars of demand, and affidavit of plaintiff's agent.
2. Summons and marshal's return of same.
3. Pleas and affidavit of defendant.
4. Remittitur and motion for judgment, filed Nov. 19, 1901.
5. Order of December 2d, 1901, overruling motion for judgment.
6. Order of Court of Appeals of December 4, 1901, allowing special appeal.
7. Order fixing amount of bond for costs.
8. Citation.
9. Entry showing approval and filing of bond.

LORENZO A. BAILEY,
Attorney for Plaintiff and Appellant.

12 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, { ss :
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 11, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44810, at law, wherein The Consumers' Brewing Company, a corporation, is plaintiff and Edwin Tobin is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe
Seal Supreme Court my name and affix the seal of said court, at
of the District of the city of Washington, in said District,
Columbia. this 17 day of December, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1153. Consumers' Brewing Company, a corporation, appellant, vs. Edwin Tobin. Court of Appeals, District of Columbia. Filed Dec. 17, 1901. Robert Willett, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA.
FILED

JAN 7 1902

APPELLANT'S *Robert W. Bailey* BRIEF

CLERK

Court of Appeals, District of Columbia.

~~OCTOBER~~ TERM, 1901.

No. ~~4122~~ *1122*

No. ~~15~~ SPECIAL CALENDAR.

CONSUMERS' BREWING COMPANY,

Appellant,

vs.

EDWIN TOBIN.

LORENZO A. BAILEY,

Attorney for Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

October 1901 **OCTOBER TERM, 1901.** *1902*

CONSUMERS' BREWING COMPANY,

Appellant,

vs.

EDWIN TOBIN.

No. ~~4122~~ *1122*
No. 15, Special
Calendar.

APPELLANT'S BRIEF.

I.

This is an action of assumpsit. The question involved is as to the sufficiency of an affidavit of defense under the 73d Common Law Rule of the Supreme Court of the District of Columbia.

In that Court, the appellant, a corporation, filed its declaration with particulars of demand and an affidavit of its agent, setting out distinctly the cause of action and the sum claimed to be due, exclusive of all set-offs and just grounds of defense. Copies of the declaration and of said affidavit were served on the defendant, who thereupon appeared and filed his two pleas in bar, with his affidavit of defense.

The declaration consists of one special count and the common counts. The special count is upon the promissory note of the defendant and his wife, payable on demand to Abe King or order, and by the payee endorsed to the plaintiff corporation, of which the said Abe King was secretary and treasurer. The common counts are upon said note and also an open account between the plaintiff and the defendant. Copies of the note and account are set forth in the particulars of demand.

The pleas are, respectively, "never promised" and "not indebted."

In his affidavit of defense the defendant admits his indebtedness to the plaintiff, as to the open account, in the sum of \$19.30, and makes tender thereof, but denies his liability on the note, alleging as the sole ground of his defense, that the said note "was procured by the fraudulent misrepresentations and imposition of one Edward L. Jordan at and before the time of the execution thereof, the said Jordan being, at said time, the president of the plaintiff company." This general allegation is followed, in the defendant's affidavit, by a statement of the specific facts upon which he relies, and which are in substance and effect as follows, viz.:

That the plaintiff at one time was secured by a mortgage on certain personal property in the Exchange and Ballard hotel, at Alexandria, Va., and at an auction sale under said mortgage, the plaintiff bought said personal property; that thereafter, the said Edward L. Jordan, president of the plaintiff corporation, informed the defendant that said personal property was for sale and "that said place was a good business stand," and advised and urged the defendant to purchase the same and engage in business at said place; that the defendant was totally unacquainted with the value of said stand as a business place and was also unacquainted with the city of Alexandria, and acting and relying upon the said advice and representations of said Jordan, the de-

fendant purchased said personal property and took a bill of sale therefor, and gave in payment therefor the note in suit and entered into possession of the hotel and commenced the conduct of the said business, but "that said business was unprofitable from the start"; that the defendant afterward abandoned the active management of said business and sold the stock in trade to a third party and lost a considerable sum by reason of his said venture; that the said Jordan knew the said business was not a profitable one.

In the affidavit of defense the defendant also denied his liability as to certain items in the open account, amounting to \$15.75, and thereafter the plaintiff caused to be entered of record a remittitur thereof.

Thereupon the plaintiff moved for judgment under said 73d common law rule, for the amount claimed in the declaration less said sum of \$15.75 so remitted as aforesaid, which motion the court below overruled and caused to be entered an order to that effect, from which said order this court allowed the plaintiff, upon its petition, a special appeal, which appeal has been duly perfected.

In the court below no question was raised as to the sufficiency of the plaintiff's affidavit. The only question considered was as to the sufficiency of the affidavit of defense; the court being of the opinion that, while the affidavit of defense may be technically defective, yet that "it indicated enough to entitle the defendant to a trial by jury."

II.

The court below erred: (1) in finding the affidavit of defense to be sufficient; and also (2) in overruling and denying the plaintiff's motion for judgment.

III.

I. The 73d Common Law Rule of the Supreme Court

of the District of Columbia was made and promulgated by that court in General Term, and cannot be changed or suspended by one judge at Special term. Its interpretation and administration are not left to the discretion of the court.

The rule has the force of law and is binding upon the court as well as upon the parties.

In re Bryant, 9 App. D. C., 447.

Wall v. Wall, 2 H. & G., 79, 82.

Thompson v. Hatch, 3 Pick., 512, 515, 516.

Tripp v. Brownell, 2 Gray, 402.

Coyote G. & S. M. Co. v. Ruble, 9 Oregon, 121.

Hughes v. Jackson, 12 Md., 450, 463.

The plaintiff who seeks the right given him under that rule and complies with it is entitled, as a *matter of law*, to a judgment for the amount he claims, unless the defendant shall set up in his affidavit "in precise and distinct terms the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part."

2. The defendant's grounds of defense are, in effect, no more than this: that the plaintiff, by its president, informed the defendant that the hotel "was a good business stand," and that the defendant, relying thereon, bought certain personal property at the hotel and gave therefor the note in suit and took possession of the hotel and commenced "the conduct of said business," but the "said business was unprofitable from the start," and the defendant abandoned the active management thereof and sold the stock in trade to a third party.

All this, if true, is wholly insufficient to defeat the plaintiff's claim in whole or in part.

In the first place, Mr. Jordan's statement that the hotel "was a good business stand," was merely his opinion. If

it was anything more than that it was certainly no more than a promise that, under proper and skillful management, a profitable business could be carried on there. "A misrepresentation, to become the basis of fraud, must be of an existing fact, and not a promise."

Wheeler *v.* Mowers, 38 N. Y. Supp., 951.

But the statement did not necessarily apply to the hotel business, or any other particular business. We are left wholly in the dark as to what kind of business Jordan had reference to and also as to what kind of business the defendant actually commenced to conduct and found unprofitable. For all that appears in the affidavit of defense, it may have been fully understood by and between Mr. Jordan and the defendant that the statement referred to the use of the hotel property as a stand for a saloon and liquor business only and that the defendant undertook to conduct a general hotel business there, which he found unprofitable, or *vice versa*.

Furthermore, there is not a word in the defendant's affidavit denying the truth of the statement made by Jordan. The defendant may be incompetent to conduct any kind of business, and the fact that he found the business which he entered upon to be "unprofitable from the start" is quite irrelevant, and is certainly insufficient as matter of defense. It certainly does not show that the place was not exactly what Jordan said it was—a good business stand.

In these particulars the affidavit of defense is evasive and uncertain and the defect is not cured by the use of epithets and general charges of fraud and imposition which are not supported by the facts themselves. Fraud ought not lightly to be imputed. The legal presumption is the other way.

Security Investment Co. *v.* Garrett, 3 App. D. C.,
69, 76.

3. The defendant's statement that he was unacquainted with the city of Alexandria and with the "value of the said stand as a business place," does not take this case out of the rule *caveat emptor*, which applies in all its force to this transaction. Mere "dealing" talk or "puffing of goods" will not constitute fraud. It is well settled that, where a party can protect himself by ordinary care and prudence, he must do so; and if with full means of knowledge, being equally able to judge of a matter for himself, he relies upon the representations of another, with whom he stands on an equal footing, without exercising the means of knowledge open to him, neither the courts of law nor courts of equity will relieve him from the effects of such folly.

Slaughter *v.* Gerson, 80 U. S., 379.

8 A. & E. Enc., 643, 644, and numerous cases cited in the notes.

4. It appears by the defendant's affidavit, that he found the business "unprofitable from the start." The date of this discovery may be fixed, approximately, as May 7, 1900, the date of the note. After that discovery, and with full knowledge of all the matters upon which he relies for his defense, he sold out his business to a third party, Dean, to whom he rented the personal property for which he had given the note, and collected from Dean, as rent, an amount equal to the interest on the note, and continued to pay interest on the note until January 7, 1901 (Record, p. 2). By thus retaining, using and dealing with the said personal property he has affirmed the contract and waived his right to complain of the matters alleged by him.

Benj. on Sales (4th Am. Ed.), Sec. 452 *et seq.*

21 A. & E. Enc., 77 to 79, and numerous cases cited in notes.

It was also incumbent upon the defendant to act promptly

in asserting his right of rescission, if it ever existed, and in giving notice of disaffirmance. He has never given such notice.

21 A. & E. Enc., 84; 8 *Id.*, 653.

It was also incumbent, in such case, to return, or offer to return to the plaintiff the consideration which he had received for said note. He has not only failed to do so, but he put it out of his power to do so by disposing of the business to Dean, leaving the plaintiff no remedy except foreclosure and a right of action for the deficiency.

Lyons *v.* Allen, 11 App. D. C., 543; 26 W. L. R., 50.

Benj. on Sales, Sec. 452, *et seq.*

21 A. & E. Enc., 84, and cases cited.

5. The defendant says the chattels were not worth the amount of the note which he gave for them, but he does not state what they were worth.

It is evident that the note is supported by a valuable consideration. He seeks to avoid his contract on the ground of fraud, but fails to show any fraud, and judgment should, therefore, be rendered for the plaintiff for the full amount claimed in the declaration, less \$15.75 to be credited on the open account.

LORENZO A. BAILEY,
For Appellant.